KEMENTERIAN PERTAHANAN MALAYSIA & ANOR A

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION BHD & ORS B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AZMEL MAAMOR JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: W-01-6-2003] C
13 JUNE 2007

INSURANCE: *Marine insurance - Contract of indemnity - Subrogation clause - Insured Government of Malaysia - Rights of insured against third parties subrogated to insurer - Locus standi of insurer - Whether could institute proceedings in name of insured - Indemnity clause - Whether triggered the moment insurer agreed to indemnify - Government Proceedings Act 1956, s. 24(3)* D

CONTRACT: *Insurance - Policy - Contract of indemnity - Subrogation clause - Insured Government of Malaysia - Rights of insured against third parties subrogated to insurer - Whether insurer clothed with locus standi to institute proceedings in name of insured - Government Proceedings Act 1956, s. 24(3)* E

The appellants, the Ministry of Defence, Malaysia and the Government of Malaysia, had executed a contract of insurance with Perdana Cigna Insurance Bhd ('the insurers') whereby the insurers undertook to indemnify the appellants against loss or damage arising from all shipping and sending on or after 20 October 1992. The insurance policy included a subrogation clause to the effect that the appellants would subrogate to the insurers their rights and claims against others and would permit suits to be brought in their name at the insurers' expense. On 23 February 1995, the appellants submitted a claim in respect of damage caused to certain equipment during transportation from the ship to the discharge terminal, whereof the insurers admitted liability and paid the supplier ('GEC-Marconi') £176,987 for the replacement of the equipment. However, prior to the payment, the insurers, in exercise of its right of subrogation, had, through the legal firm of Messrs. Shook Lin & Bok, filed two negligence suits in the name of the appellants against the first respondent ('MISC') and the second and third respondents respectively. These actions were F G H I

later consolidated by a court order dated 9 February 1998. Be that as it may, MISC applied to strike out the suit against it on the ground that Messrs. Shook Lin & Bok had no authority to act on behalf of the Government of Malaysia, the second appellant (second and third respondents agreed to be bound by the decision therein). The application was dismissed by the registrar, but on appeal it was allowed with the result that the appellants' suit was struck out by the learned judge. The appellants appealed and argued that the learned judge was wrong in ruling: (i) that s. 24(3) of the Government Proceedings Act 1956 ('the Act') applied with the result that Messrs. Shook Lin & Bok had no *locus standi* to act for the second appellant since it had not been so retained by the Attorney General's Chambers; (ii) that the doctrine of subrogation and its particulars were material facts that must be pleaded and that the appellants' failure to plead same in the statement of claim was fatal; (iii) that no right of subrogation could accrue to the insurers until full payment under the policy had been effected; and (iv) that the institution of proceedings against the respondents in 1995 was premature since the letter giving the insurers the right to institute proceedings was dated 21 May 1997.

Held (allowing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) "Subrogation" is concerned with the mutual rights and liabilities of parties to a contract of insurance. Pursuant to a contract of insurance, where the insurer indemnifies an insured for a loss, the insurer is entitled to "stand in the shoes" of the assured and to receive the benefit of all of the rights and remedies which the assured may have against third parties in respect of such loss. (para 7)

(2) The learned judge erred in holding that Messrs. Shook Lin & Bok lacked authority to file proceedings in the name of the Government of Malaysia in respect of the rights subrogated to the insurers. Although the cause of action in the suits filed is that of the appellants, by reason of the insurers having the carriage and control of the suits, the right to appoint solicitors to pursue the claim against the respondents clearly lies with the insurers, not the appellants. The insurers, at all times, was *dominus litus* of the proceedings.

Messrs. Shook Lin & Bok had been duly appointed by the insurers to institute proceedings in the appellants' names to recover the loss. (para 10)

(3) The insurers' agreement to indemnify the appellants under the policy amounts to a discharge of the contract, and thereafter the insurers has been subrogated with the appellants' rights in respect of the claim. Once subrogated, the insurers are the masters of the assured's right to sue. As the right of action exists the moment a contract of indemnity is entered into, the insurers are entitled to exercise their right of subrogation under the contract of indemnity the moment it agreed to accept liability of the appellants' claim under the policy, which was on 4 April 1995. Consequently, as of that date 4 April 1995, the insurers were entitled to "step into the shoes" of the appellants to pursue their claim against the respondents. The time of the actual transmission of monies by the insurers to GEC-Marconi was irrelevant as such transmission merely amounted to a term of the settlement entered into between the insurers and the appellants. (para 12)

(3a) Consequently, we would agree with the stand taken by the Attorney General that, as the Government of Malaysia, the assured, were merely lending their name to the insurers for the enforcement of the appellants' rights and remedies as against the respondents to which the insurers had been subrogated, authorization under s. 24 of the Act was not necessary. (paras 9 & 10)

(4) In questioning the timing of the transmission of monies, the first respondent was in essence challenging the said settlement, which the first respondent has no right to do. The commencement of the consolidated suits on 19 April 1995 against the respondents was, in this situation, not premature. In any event the time of subrogation is of no relevance to the first respondent, since their rights remain the same whether the suit is controlled by the insurers or the assured. (para 12)

(5) On the issue of subrogation not being pleaded, the appellants need only state in summary form facts which they are relying on for the purpose of formulating a complete cause of action against the respondents, namely the alleged

A negligent acts of the respondent and/or their agents resulting in loss and damage. There is no necessity to plead the doctrine of subrogation and particulars giving rise to the same. (para 13)

B *[Orders of High Court set aside, writs restored to file and case reverted to High Court]*

Bahasa Malaysia *translation of headnotes*

Perayu-perayu, Kementerian Pertahanan Malaysia dan Kerajaan
C Malaysia, telah memeterai satu kontrak insurans dengan Perdana Cigna Insurance Berhad ('penanggung insurans') di mana penanggung insurans bersetuju untuk menanggung rugi perayu-perayu terhadap kerosakan atau kerugian yang berbangkit dari segala urusan penghantaran dan perkapalan pada atau selepas 20
D Oktober 1992. Polisi insurans tersebut mengandungi satu fasal subrogasi yang menyatakan bahawa segala hak dan tuntutan perayu-perayu terhadap orang lain adalah disubrogasi kepada penanggung insurans, dan bahawa perayu-perayu membenarkan nama mereka digunakan bagi maksud pemfailan guaman oleh
E penanggung insurans atas perbelanjaan penanggung insurans sendiri. Pada 23 Februari 1995, perayu-perayu telah mengemukakan satu tuntutan berkaitan kerosakan yang dialami satu peralatan tertentu semasa ia diturunkan dari kapal ke terminal pemunggahan, dan berikutnya penanggung insurans mengakui
F liabiliti dan membayar £176,987 kepada pembekal ('GEC-Marconi') untuk mengganti peralatan. Bagaimanapun, sebelum membuat pembayaran, penanggung insurans, dalam melaksanakan hak subrogasinya, melalui firma guaman Tetuan Shook, Lin & Bok, telah memfail dua tindakan kecuaian masing-masing terhadap
G responden pertama ('MISC') dan responden-responden kedua dan ketiga. Guaman-guaman kemudian telah disatukan oleh satu perintah mahkamah bertarikh 9 Februari 1998. Apapun, MISC kemudian memfail permohonan untuk membatalkan tindakan terhadapnya atas alasan bahawa Tetuan Shook Lin & Bok tidak
H mempunyai autoriti untuk bertindak bagi pihak perayu kedua, Kerajaan Malaysia (responden kedua dan ketiga akur kepada keputusan permohonan). Permohonan ditolak oleh pendaftar, tetapi semasa rayuan ia telah dibenarkan sekaligus menyebabkan guaman perayu-perayu dibatalkan oleh yang arif hakim. Perayu-
I perayu merayu dan berhujah bahawa yang arif hakim khilaf dalam mendapati: (i) bahawa s. 24(3) Akta Prosiding Kerajaan 1956 ('Akta') terpakai berakibat Messrs. Shook Lin & Bok tidak

mempunyai *locus standi* untuk bertindak bagi pihak perayu kedua disebabkan khidmatnya tidak diminta oleh Jabatan Peguam Negara; (ii) bahawa doktrin subrogasi dan butiran-butiran mengenainya adalah fakta material yang perlu diplid dan kegagalan perayu-perayu berbuat demikian di dalam Penyata Tuntutan mereka adalah fatal; (iii) bahawa hak subrogasi tidak terakru kepada penanggung insurans selagi bayaran sepenuhnya di bawah polisi tidak dibuat; dan (iv) bahawa pemfailan prosiding terhadap responden-responden pada tahun 1995 adalah pra-matang disebabkan surat yang memberi kebenaran kepada pemegang insurans untuk memulakan prosiding hanya bertarikh 21 Mei 1997.

Diputuskan (membenarkan rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) "Subrogasi" menyentuhi hak dan liabiliti mutual pihak-pihak dalam suatu kontrak insurans. Dalam suatu kontrak insurans, di mana penanggung insurans menanggung rugi seorang pengambil insurans atas suatu kerugian, penanggung insurans berhak untuk "mengambil tempat" pengambil insurans dan menerima segala manfaat yang berbangkit dari hak-hak dan remedi yang mungkin dimiliki oleh pengambil insurans terhadap pihak-pihak ketiga berkaitan kerugian tersebut.

(2) Yang arif hakim khilaf apabila memutuskan bahawa Messrs. Shook Lin & Bok tidak mempunyai autoriti untuk memfail prosiding atas nama Kerajaan Malaysia berhubung hak-hak yang disubrogasi kepada penanggung insurans. Walaupun kausa tindakan dalam guaman yang difail adalah kausa tindakan perayu-perayu, mengambilkira bahawa yang sebenarnya mempunyai kawalan dan pengendalian guaman adalah penanggung insurans, maka hak untuk melantik peguamcara untuk meneruskan tuntutan terhadap responden-responden adalah terletak pada penanggung insurans, dan bukannya perayu-perayu. Penanggung insurans, pada semua waktu material, adalah *dominus litus* bagi prosiding. Messrs. Shook Lin & Bok telah dilantik secara teratur oleh penanggung insurans untuk memulakan prosiding atas nama perayu-perayu bagi mendapatkan gantirugi.

(3) Persetujuan penanggung insurans untuk menanggung rugi perayu-perayu di bawah polisi insurans adalah satu penunaian kontrak, dan selepas itu penanggung insurans disubrogasi dengan hak perayu-perayu berkaitan dengan tuntutan. Sebaik disubrogasi, penanggung insurans adalah tuan kepada hak perayu-perayu untuk mendakwa. Oleh kerana hak kepada tindakan berbangkit sebaik sahaja kontrak indemniti dimasuki, penanggung insurans adalah berhak untuk melaksanakan hak subrogasi mereka di bawah kontrak indemniti sebaik ia menerima liabiliti terhadap tuntutan perayu-perayu di bawah polisi, iaitu pada 4 April 1995. Oleh itu, sejak dari tarikh 4 April 1995, penanggung insurans berhak untuk "mengambil tempat" perayu-perayu bagi meneruskan tuntutan mereka terhadap responden-responden. Masa sebenar pembayaran wang oleh penanggung insurans kepada GEC-Marconi adalah tidak relevan oleh kerana pembayaran tersebut hanyalah merupakan satu terma penyelesaian yang dimeterai di antara pemegang insurans dan perayu-perayu.

(3a) Oleh yang demikian, kami bersetuju dengan pendirian yang diambil oleh Peguam Negara, iaitu, oleh kerana Kerajaan Malaysia, pengambil insurans, hanya meminjamkan nama mereka kepada penanggung insurans bagi maksud pelaksanaan hak dan remedi perayu-perayu terhadap responden-responden di mana penanggung insurans telahpun disubrogasi, maka authorization di bawah s. 24(3) Akta adalah tidak perlu.

(4) Dalam mempersoalkan masa pembayaran wang, responden pertama telah mencabar penyelesaian yang berkenaan, yang mana ia sebenarnya tidak berhak berbuat demikian. Permulaan guaman yang disatukan pada 19 April 1995 terhadap responden-responden, dalam halkeadaan di sini, bukanlah pra-matang. Walau apapun, masa subrogasi adalah tidak relevan kepada responden pertama, oleh kerana hak-hak mereka masih kekal sama ada guaman dikawal oleh penanggung insurans ataupun pengambil insurans.

(5) Berhubung isu subrogasi tidak diplidkan, bagi tujuan membentuk satu kausa tindakan yang sempurna terhadap responden-responden, perayu-perayu hanya perlu menyatakan dalam bentuk ringkasan, fakta-fakta yang mereka bergantung, iaitu perlakuan-perlakuan kecuaian responden-responden dan/

atau agen-agen mereka yang didakwa menyebabkan kerosakan dan kerugian. Tiada keperluan untuk memplid doktrin subrogasi serta butiran-butiran yang membangkitkannya.

[Perintah-perintah Mahkamah Tinggi diketepikan, writ dikembali kepada fail dan kes dikembalikan ke Mahkamah Tinggi]

Case(s) referred to:
Castellain v. Preston [1883] Vol IX QBD 380 ***(refd)***
King v. Victorea Insurance Company Ltd [1986] AC 250 ***(refd)***
State Government Insurance Office v. Brisbane Stevedoring Pty Ltd [1969] 123 CLR 228 ***(refd)***
Hobbs v. Marlowe [1978] AC 16 ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 24(3)

Other source(s) refeered to:
Kenneth Sutton, *Insurance Law in Australia*
Poh Chu Chai, *Law of Insurance*

For the appellants/plaintiffs - M Nagarajah (Alvin Tang with him); M/s Shook Lin & Bok
For the 1st respondent - Eric Siow; M/s Lee Ong & Kandiah
For the 2nd respondent - Jason Wee; M/s Tommy Thomas
For the 3rd respondent - Karamjit Kaur; M/s H Karamjit & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D1-21-1-1995]

Reported by WA Sharif

JUDGMENT

Zaleha Zahari JCA:

[1] The appellants were insured by Perdana Cigna Insurance Bhd ("the insurers") under a Marine Open Policy against loss or damage arising from all shipping and sendings on or after 20 October 1992. The policy issued by the insurers was at all times a contract of indemnity. The policy, *inter alia*, included a subrogation clause, that at the request of the insurers, the appellants shall subrogate to the insurers their rights and claims against others and permit a suit to be brought in the appellants' name at the insurers' expense.

[2] By letter dated 23 February 1995, the appellants submitted a claim in respect of damage caused to certain equipment on 19 April 1994 during the carriage/transportation from the ship on discharge to the terminal for storage pending delivery to the appellants, as consignee. Letter dated 4 April 1995, minutes of meeting held on 4 April 1995, letter dated 27 April 1995 to GEC-Marconi Projects (Malaysia) Sdn. Bhd and letter dated 2 August 1995, show that the insurers admitted the appellants' claim. The settlement arrived at was that the damaged equipment would be replaced by the supplier, GEC-Marconi Projects (Malaysia) Sdn. Bhd. ("GEC-Marconi") and that payment would be made directly to GEC-Marconi. Subsequently, on 21 May 1997, consequential upon the agreement between the insurers and the appellants, the insurers paid to GEC-Marconi a sum of £176,987.

[3] However, prior to the above payment, on 19 April 1995, pursuant to the terms of the policy, in exercise of the insurers right of subrogation, Messrs Shook Lin & Bok, having been retained by the insurers, at the insurers' expense, filed two suits in the appellants' names namely Kuala Lumpur High Court No. D1-27-21-1995 against Malaysia International Shipping Corporation ("MISC", the 1st respondent in this appeal) and Kuala Lumpur High Court No. D1-21-1-1995 against Kelang Container Terminal Berhad and Kontena Nasional Berhad (the 2nd and 3rd respondent in this appeal).

[4] Both actions were subsequently consolidated pursuant to court order dated 9 February 1998. Thereafter, on 28 April 1999, MISC, the 1st respondent in this appeal, filed an application to strike out the suit instituted against them on the ground that Messrs Shook Lin & Bok had no authority to act on behalf of the 2nd appellant for failure to furnish any evidence of having been appointed by the Attorney General's Chambers confirming that they have been appointed to act for the Government of Malaysia.

[5] The 1st respondent's striking out application was dismissed by the senior assistant registrar (SAR) on 16 February 2001. On appeal by the 1st respondent to the judge-in-chambers against the SAR's decision, on 19 April 1994, the judge allowed the 1st respondent's appeal, reversed the decision of the SAR, and struck out the appellants' suit with no order as to costs. The 2nd and

3rd respondent have agreed to be bound by the decision of the High Court Judge although they did not themselves file an application to strike out.

[6] The judge was of the view that s. 24(3) of the Government Proceedings Act 1956 ("the Act") was applicable. He then ruled that Messrs Shook Lin & Bok had no authority to act on behalf of the Government of Malaysia as they had failed to furnish any evidence of having been duly retained by the Attorney General's Chambers to act for the Government of Malaysia. The judge ruled that a solicitor who has not shown any authority to act for the party he purports to act, the suit filed by him must by struck out. The judge was further of the view that the doctrine of subrogation and/or its particulars were material facts which must be pleaded. He then ruled that the failure to plead the doctrine of subrogation and particularizing the facts giving rise to the same in the statement of claim, was fatal. As for letter of subrogation dated 21 May 1997, the judge was of the view that that letter was not a proper letter of subrogation by reason of that letter not having been issued by the insured party under the policy. The judge was of the view that based on the facts in this case the proper party to be cited as plaintiffs was not the Government of Malaysia, nor the Malaysian Ministry of Defence but GEC-Marconi Projects (Malaysia) Sdn Bhd, the party who received payment under the said policy. He was further of the view that no right of subrogation accrued to the insurers until full payment under the policy had been effected. Noting that the letter giving the insurers the right to institute proceedings was dated 21 May 1997, he found the institution of proceedings against the respondents in 1995 to be premature.

[7] In determining the issues in this appeal we took into consideration the following principles. "Subrogation" is concerned with the mutual rights and liabilities of parties to a contract of insurance. Pursuant to a contract of insurance, where an insurer indemnifies an assured for a loss, he is entitled to "stand in the shoes" of the assured and to receive the benefit of all of the rights and remedies which the assured may have against third parties in respect of such loss (*Insurance Law in Australia, Kenneth Sutton; Castellain v. Preston* [1883] Vol IX QBD 380). This right is inherent in a contract of indemnity. It does not depend for its existence upon the occurrence of a loss under the policy but its

A exercise is of course dependent upon the payment of the loss. But as a right, it exists from the moment of the making of the contract of indemnity (*State Government Insurance Office v. Brisbane Stevedoring Pty Ltd* [1969] 123 CLR 228 at 240, per Barwick CJ).

B **[8]** The cause of action in such cases at all times lies with the assured. Other than the assured, no one else can institute any remedy. As against the wrongdoer the insurer has no cause of action of his own (*Hobbs v. Marlowe* [1978] AC 16 at 37). The assured must bring an action against the wrongdoer if he is called C upon by his insurer to do so and is indemnified against the costs, but it is the assured's cause of action, not that of the insurer, that he sues on. The assured, is a nominal plaintiff. The real plaintiff is the subrogated insurer as they are the one instructing solicitors, paying for the action, and the person to benefit from the action, D and to lose by the action, if it is lost. Should an action be instituted against a third party, the third party's rights remain exactly the same whether he is being sued by the insurer or the assured.

E **[9]** On the issue of whether Messrs Shook Lin & Bok has the *locus standi* of to act for the Government of Malaysia, it is common ground that an authorization under s. 24(3) of the Government Proceedings Act 1956 ("the Act") had not been issued by the Attorney General as evident from the letter of the Senior Federal F Counsel, Ministry of Defence dated 7 June 1999. The stand taken by the Attorney General was that, as the Government of Malaysia, the assured, were merely lending their names to the insurers for the enforcement of the appellants' rights and remedies as against the respondents to which the insurers has been G subrogated, an authorization under s. 24(3) of the Act was not necessary.

[10] We agree. Although the cause of action in the suits filed is that of the appellants, by reason of the insurers having the carriage and control of the suits, the right to appoint solicitors to H pursue the claim against the respondents clearly lies with the insurers, not the appellants. The insurers, at all times was *dominus litus* of the proceedings. Messrs Shook Lin & Bok has been duly appointed by the insurers to institute proceedings in the appellants' names to recover the loss. In this situation we are of the view I

that the learned High Court Judge erred in holding that Messrs Shook Lin & Bok lacked authority to file proceedings in the name of the Government of Malaysia in respect of the rights subrogated to the insurers.

[11] It is abundantly clear that prior to the filing of these suits, the insurers had admitted liability under the insurance policy. An agreement was already in place as between the appellants and the insurers, by which agreement the appellants were to be compensated by way of reinstatement of the damaged items insured under the insurance policy by GEC-Marconi Radar and Defence Systems Limited (the manufacturer of the damaged items) and that the costs of the reinstatement would be borne by the insurers. The implementation of this agreement between the insurers and the appellants was the foundation upon which the appellant's rights have been subrogated to the insurers. The appellants had, on the facts of this case, been recompensed in accordance with the terms agreed upon.

[12] We are of the considered view that an insurer's agreement to indemnify the appellants in respect of the damaged equipment under the policy of an insurance in issue amounts to the discharge of the contract and thereafter the insurers has been subrogated with the appellants' rights in respect the claim. Once subrogated, the insurers are the masters of the assured's right to sue. As the right of action exists the moment a contract of indemnity is entered into, the insurers are entitled to exercise their right of subrogation under the contract of indemnity the moment the insurers agreed to accept liability of the appellants' claim under the Marine Open Policy, which was on 4 April 1995. As from this date, 4 April 1995, the insurers were entitled to "step into the shoes" of the appellants to pursue their claim against the respondents. The time of the actual transmission of monies by the insurers to GEC-Marconi was irrelevant as such transmission merely amounted to a term of the settlement entered into between the insurers and the appellants. In questioning the timing of the transmission of monies, the 1st respondent was in essence challenging the said settlement, which the 1st respondent has no right to question. (*Law of Insurance, Poh Chu Chai; King v. Victorea Insurance Company Ltd* [1986] AC 250 (PC)). The commencement of the consolidated suits on 19 April 1995 against the respondent

A was, in this situation, not premature. In any event the time of subrogation is of no relevance to the 1st respondent, since their rights remain exactly the same whether the suit is controlled by the insurers, or the assured.

B **[13]** On the issue of subrogation not being pleaded, it is appropriate to reiterate the function of pleadings is to give notice of the case which has to be met by the opposing party. The purpose of particulars is to define the issues and to indicate to the opposing party how much range of his possible evidence will be C relevant to meet those issues. In the circumstance of the present case the appellants need only state in summary form facts which they are relying on for the purpose of formulating a complete cause of action against the respondents, ie, the alleged negligent acts of the respondent and/or their agents resulting in loss and D damage. In our considered opinion there is no necessity to plead the doctrine of subrogation and particulars giving rise to the same.

[14] For the reasons above, the appellants' appeal is allowed with costs. Costs of this appeal to follow event at trial. The deposit is E to be paid to appellants. All orders of the High Court Judge are set aside, the writs restored to file and the case reverted back to the High Court for mention. The respondents was given leave to amend their respective statement of defence within 14 days, and the appellants to file a reply within 30 days, from the date of this F decision.

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